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SUPREME COURT, U.S.

No. 80-6017

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1981

RICHARD PAYTON,

Petitioner-Plaintiff,

-against-

DAVID HARRIS,

Respondent-Defendant.

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Question Presented

Whether this Court should exercise its discretion and grant certiorari to decide whether the Circuit Court properly affirmed the dismissal of petitioner's action?

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## Proceedings Below

The United States District Court for the Southern District of New York (Judge Henry F. Werker) dismissed petitioner's complaint brought pursuant to 42 U.S.C. § 1983 which sought injunctive and declaratory relief and damages regarding his transfer under the Interstate Agreement on Detainers (Detainer Agreement), New York Criminal Procedure Law § 580.20. Petitioner was transferred pursuant to this Agreement from the Green Haven Correctional Facility in New York to New Jersey

for trial there on criminal charges. On appeal to the Second Circuit Court of Appeals, petitioner challenged the absence of a pre-transfer hearing on both statutory and constitutional grounds and argued that District Judge Werker erred in his memorandum opinions dated November 5, 1979 and February 21, 1980 in granting judgment to defendant while material issues of fact were allegedly still in dispute. The memorandum decisions of Judge Werker dated November 5, 1979 and February 21, 1980 and the Second Circuit's decision of October 15, 1980, are annexed to petitioner's application for certiorari as Exhibits 2, 1, and A respectively.

Petitioner is presently serving a sentence of 20 years to life in the Green Haven Correctional Facility in New York for murder. After he was transferred to New Jersey in August 1978, he was convicted in that state of murder, assault, and other related crimes. These convictions were not challenged. Petitioner conceded that the only issues which would have been opened in the pre-transfer hearing he was allegedly denied under the Detainer Agreement were whether he had been substantially charged with a crime in the demanding state (New Jersey), whether he was a fugitive from that state, whether he was present in the demanding state at the time that the crime was committed, and whether the required papers were in order and he was, in fact, the person being charged. Michigan v. Doran, 439 U.S. 282, 289 (1978).

The Second Circuit found that given the verdict in New Jersey, all of these issues must be deemed substantially resolved against petitioner, indicating that even if he had

been afforded a pre-transfer hearing it would not have affected his current status, a conclusion reinforced by the failure of petitioner's counsel to take advantage of the hearing in New York on November 3, 1978. The Second Circuit declined to pass on the merits of petitioner's challenge to respondent's construction of the Detainer Agreement noting that the issue was presently sub judice in the United States Supreme Court in Adams v. Cuyler, 592 F. 2d 720 (3d Cir. 1979), cert. granted, 100 S. Ct. 1011 (1980 (argued October 7, 1980).*

The Second Circuit also determined that although the documentary evidence offered by respondent in the District Court might not have been sufficient to sustain the government's familiarity with the procedures of the Agreement, including his August 27, 1978 letter to the Governor of New Jersey, provided persuasive evidence that petitioner was, in fact, informed of all of his rights.

## Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

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* This Court affirmed the Third Circuit's decision on January 21, 1981, holding that prisoners transferred pursuant to the Interstate Agreement on Detainers are entitled to a pre-transfer hearing. Cuyler v. Adams, ___ U.S. ___, 66 L. ed 2d 641, 101 S. Ct. ___ (Rehnquist, Burger, and Stewart, dissenting).

## ARGUMENT

On January 21, 1981, this Court affirmed the decision of the Third Circuit in Cuyler v. Adams, ___ U.S. ___, 66 L. ed 2d 641, 101 S. Ct. ____. The opinion held that prisoners transferred pursuant to provisions of Article IV of the Detainer Agreement are entitled to a pre-transfer hearing before being transferred to another jurisdiction pursuant to Article IV of the Detainer Agreement, so that the prisoner, therefore, stated a claim for relief under 42 U.S.C. § 1983 when he asserted that State officials failed to grant him the requisite pre-transfer hearing.

Since the Third Circuit in Cuyler v. Adams, supra, held that prisoners are entitled to a pre-transfer hearing as a matter of statutory construction of the Detainer Agreement, this Court considered only that issue. The dissent viewed the Detainer Agreement as a State statute and would have deferred to the State court's interpretation of it. The dissent further noted that they would reverse and remand with instructions to the Court of Appeals to consider respondent's constitutional claims which were avoided by the Third Circuit by what the dissenters considered unjustifiable statutory interpretation.

It is the position of respondent in the instant case that the petition for certiorari should not be granted since the Court has already decided the issue. Furthermore, there is no need to reverse and remand for further consideration because the Second Circuit found the determination of this issue was not material.

After petitioner was transferred to New Jersey in August 1978, he was convicted in that state of murder, assault and other related crimes, convictions he expressly does not challenge. He concedes that the only issues which would have been open in the pre-transfer hearing he was denied under the Detainer Agreement were whether he had been substantially charged with a crime in the demanding state (New Jersey), whether he was a fugitive from that state, whether he was present in the demanding state at the time that the crime was committed, and whether the required papers were in order and he was, in fact, the person being charged. See Michigan v. Doran, 439 U.S. 282, 289 (1978).

The Second Circuit held that given the verdict in New Jersey, however, all of these issues must be deemed substantially resolved against petitioner, indicating that even if he had been afforded a pre-transfer hearing it would not have affected his current status, a conclusion reinforced by the failure of petitioner's counsel to take advantage of the hearing in New York on November 3, 1978.

At the time of petitioner's transfer (1978) respondent was operating in good faith and in the manner approved by the State courts. Notwithstanding the fact that this Court has recently interpreted the statute to include the right to a pre-transfer hearing, the denial of such in this case should be deemed harmless error. Petitioner suffered no damages as a result of his transfer. Any violation of petitioner's rights were statutory and hence, the complaint does not state a claim under 42 U.S.C. § 1983.

Finally, it must be pointed out that on October 27, 1978, petitioner, through his attorney Charles Clancy, moved before the Honorable Felix Martino, Superior Court of New Jersey, to dismiss his indictment because he was denied a transfer hearing. Although defense counsel could have appeared at the rescheduled hearing in Dutchess County, New York, by letter dated November 2, 1978, petitioner withdrew his motion to dismiss the indictment based upon an alleged defect in the detainer procedure. Any right to said hearing was, therefore, waived when petitioner did not pursue the hearing and withdrew his motion.

Rights under the Interstate Agreement on Detainers may be waived by a transfer request or by failure to assert the rights. These rights are purely statutory and as such need not be knowingly waived under Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

## CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
April 9, 1981

Respectfully submitted,

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